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No. 04-909 JAN 4 - 2005

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# In The Supreme Court of the United States

ROD B. SCHWARTZ,

*Petitioner,*

v.

FREEDA ISAAC,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
OF MARYLAND

## PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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## QUESTION PRESENTED

Whether due process and equal protection of the laws have been denied when a parent, as to whom a trial court has denied legal custody and visitation rights with his minor child, moves in a timely fashion on his direct appeal for a routine twenty day extension of time and, instead of a timely ruling on his motion, is punished for filing the motion by having his direct appeal permanently dismissed without any substantive cause or reason.

## LIST OF PARTIES

Petitioner is Rod B. Schwartz, natural father of the child as to whom petitioner's legal custody rights have been terminated. Respondent is Freeda Isaac, natural mother of the same child. Attorney of record for petitioner is David B. Smith, English & Smith, 526 King Street, Suite 213, Alexandria, Virginia 22314, telephone 703-548-8911, facsimile 703-548-8935.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions the Court for a writ of certiorari to review, summarily reverse, and remand the order and judgment of the Court of Special Appeals of Maryland, entered on July 9, 2004, which dismissed his pro se substantive appeal of the loss of legal custody and visitation rights with his minor child, which judgment was premised upon a one sentence order that relies on the Court's concurrent and summary denial of petitioner's timely and routine motion for an initial twenty day extension of time to file his opening appellate brief.

## OPINIONS BELOW

The order of the Court of Special Appeals of Maryland dated July 9, 2004 dismissing petitioner's appeal is unpublished. It is reprinted in the Appendix at App. 3a, *infra*. The memorandum opinion and order of the Circuit Court for Prince George's County (hereinafter "trial court") dated March 5, 2004, is unreported. It is reprinted in the Appendix at App. 4a, *infra*. A prior unreported but related opinion in the Court of Special Appeals of Maryland dated June 26, 2003, is reprinted in the Appendix at App. 18a, *infra*.

## JURISDICTION

The order of the Court of Special Appeals of Maryland dismissing petitioner's appeal was entered on July 9, 2004. The decision of that Court denying petitioner's motion for reconsideration and reinstatement of appeal was entered on August 9, 2004, App. 2a, *infra*. Petitioner's timely petition for certiorari to the Court of Appeals of Maryland, filed pursuant to § 12-203 of the Court and Judicial Proceedings Article of the Annotated Code of Maryland (2002) and Rule 8-301(a)(3) of the Maryland Rules of Procedure, was denied on October 8, 2004, App. 1a, *infra*. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment provides "...nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

This case involves a termination of legal custody and certain visitation rights of petitioner, a non-custodial parent, with his only child, Jared Isaac-Schwartz, born September 25, 1999.

Initially, a court supervised consent order was entered in 2000 giving respondent sole physical custody but specifying joint legal custody of the child and a visitation schedule.

In 2001, petitioner moved, *inter alia*, to increase the visitation schedule, and respondent responded with a request for sole physical and legal custody and to reduce petitioner's visitation. After a hearing and pending the outcome of the trial, petitioner was permitted visiting rights every other weekend from 10 a.m. on Saturday to Monday at 8 a.m., and all other Saturdays from 10 a.m. until 6 p.m.

In anticipation of the trial, a court-appointed expert and custody evaluator, Dr. Roth, prepared a fifteen page report for the trial court containing recommendations that the court appoint a facilitator, that joint legal custody continue, and that petitioner be given more time with his child. App. 25a n.9.

On the last day of the five day trial that took place in April and May 2002, the trial court issued a short decision on the record that gave sole legal custody to respondent and reduced petitioner's visitation.

On petitioner's appeal, the Court of Special Appeals of Maryland vacated the trial court order and remanded the case for further proceedings consistent with its opinion. App. C. Citing Boswell v. Boswell, 118 Md. App. 1, 33 (1997), and Boswell v. Boswell, 352 Md. 204, 219 and 220 (1998), the Court noted that non-custodial parents have a right to liberal visitation at reasonable times under reasonable conditions, and that any limits placed upon visitation must be reasonable. The Court also observed that the lower court was obligated to address whether there was a material change in circumstances affecting the welfare of the child, whether a new visitation order was in the best interests of the child before modifying custody from joint legal to sole legal custody, and how the changes made to legal custody and visitation were in the child's best interests. The Court took note that the trial record reflected that prior to ruling, the trial court had apparently not even read the fifteen page expert report by Dr. Roth, who testified at the trial. App. 25a n.9. The Court went on to state:

> In view of the fact that Jared is very young and that much time has passed since the hearing on these issues, on remand the court should consider holding an evidentiary hearing to determine what the change in circumstances are and what custody and visitation arrangements are currently in Jared's best interests. App. 35a n.17.

On remand in the trial court, the matter was set for a two hour hearing. Petitioner moved to offer expert testimony from a clinical psychologist who had observed recent interaction between the petitioner and the child, but the trial court refused to allow any evidence on custody related issues. (2/5/04 Tr. 36). The trial court then issued its March 5, 2004 order which reaffirmed the change to sole legal custody and, read literally, **reduced** to only six days per year petitioner's legal visitation rights. Pending the outcome of petitioner's subsequent appeal, another trial judge, *sua sponte*, assumed jurisdiction (3/26/03 Tr. 170), and granted an order on May 18, 2004 that effectively vacated **all** of petitioner's court ordered visitation rights with his child. (5/18/04 Tr. 36).

Petitioner appealed the trial court's March 5, 2004 memorandum opinion and order on the ground that the trial court proceedings, depriving him of joint legal custody and terminating various of his visitation rights, were inconsistent with the terms of the earlier remand. Petitioner's opening pro se appellate brief was due June 28, 2004. Ten days prior to that due date, petitioner timely filed a routine motion requesting an additional twenty days in which to file his brief and record extract, *i.e.*, until July 17, 2004. No prior enlargements of time had been requested or granted.

Petitioner's pro se motion for a 20 day extension of time was not acted upon prior to the original date his brief and record extract was due. Instead, his motion remained pending in the Court until twelve days after his brief was due. Then, on July 9, 2004, without any prior formal or informal warning to petitioner, the motion for extension was summarily denied, contrary to Maryland Rules 8-501 and 8-502(d) which indicate that an appeal will ordinarily not be dismissed for failure to file a timely record extract and that failure to file a brief is not subject to a mandatory sanction

(especially absent a showing of prejudice, pursuant to Swift v. State, 224 Md. 300, 167 A.2d 762 (1961)). Nonetheless, on the sole ground that no timely brief had been filed while his motion to extend the time to file his brief was pending, his appeal was summarily dismissed in a single sentence immediately following the single sentence denying, without justification or statement of reason, petitioner's motion for a twenty day extension. The dismissal order reads in its entirety: "ORDERED, that Appellant's appeal is hereby DISMISSED for failure to timely file a Brief and Record Extract." App. 3a.

## REASONS WHY THE WRIT SHOULD BE GRANTED

I. In a Child Custody Case, a Dismissal of an Appeal of Right from an Erroneous Trial Court Decision Which Terminated Various Visitation Rights of a Non-custodial Parent Carries Such Grave Social Consequences That a Summary Denial of a Routine Motion to Extend Time and a Concurrent Summary Dismissal, Premised Only upon the Summary Denial of the Motion, Offends the Due Process and Equal Protection Clauses of the Constitution.

A. The Due Process Clause requires that the summary order below be vacated.

It is established law in both this Court and the Court of Appeals of Maryland that the process due in a child custody matter under the Due Process Clause requires an examination of, and compliance with, the three factor test announced in Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976). The three factors identified in Eldridge are the private interest affected, the risk of error under the procedure employed by the state, and the countervailing governmental interest in support of the challenged procedure. *See* Troxel v. Granville, 530 U.S. 57,

66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J. R., 442 U.S. 584, 602, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); Washington v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct. 2258, 2267 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ [t] ... to direct the education and upbringing of one's children."). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

The three factor Mathews approach was applied to facts similar to those in the instant case by this Court in Lassiter v. Department of Social Services, 452 U.S. 18, 25, 101 S. Ct. 2153, 2158, 68 L. Ed. 2d 640 (1981). *See also*, Shurupoff v. Vockroth, 372 Md. 639, 650-651, 814 A.2d 543, 550-551 (2003), *citing* Lassiter, *supra*. In Lassiter, this Court demonstrated that what constitutes fundamental fairness in a particular situation is determined by considering the relevant precedents and then by "assessing the several interests that are at stake." The Court goes on in Lassiter, 452 U.S. at 27, to examine at length the same concerns at issue here in circumstances equally applicable to this case:

> The case of Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, propounds three elements to be evaluated in deciding what due process requires, *viz.*, the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption [that the current procedure is lawful]..."

Discussing the first factor, the nature of the private interest at stake, Lassiter, *supra*, states:

> This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to the "companionship, care, custody and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection." Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 551. Here the State sought not simply to infringe upon that interest but to end it. If the State prevails, it will have worked a unique kind of deprivation. *Cf.* May v. Anderson, 345 U.S. 528, 533, 73 S. Ct. 840, 843, 97 L. Ed. 1221; Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62. A parent's interest in the accuracy and injustice of the decision to terminate his or her parental status is, therefore a commanding one. (Footnote omitted.)

Moving on to the second Mathews factor, that of the government, Lassiter states: "Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision...." So, the Lassiter Court continues, 452 U.S. at 31:

> To summarize the above discussion of the Eldridge factors: the parent's interest is an extremely important one...; [and] the State shares with the parent an interest in a correct decision, [and] has a relatively weak pecuniary interest....

The third and last Mathews factor, as discussed in the Lassiter case, involved somewhat different facts from the interest at stake here. In the Lassiter case, the state procedure at issue in the court's child visitation procedure was whether counsel must always be appointed to represent a parent. In our case, the state procedure at issue is whether a timely routine motion may be denied in a summary fashion with no explanation of the justification for its denial, when it is used by the court as the rationale for summarily dismissing a parent's direct appeal.

While the need for appointed counsel, as in Lassiter, may or may not affect the outcome of any particular case, there is no doubt that the dismissal of a parent's direct appeal of right will always "make the risk of an erroneous deprivation of the parent's rights insupportably high." Indeed, our social contract has determined that the very point of an appeal of right is to meet the need of a parent for a fair and impartial appellate judicial review in this grave context. Therefore, on its face, we submit that an unexplained summary dismissal of that appeal of right as punishment for filing a timely routine extension motion in a child custody case violates the Due Process Clause.

In the concluding section of its analysis of state court proceedings in Lassiter, this Court states: "In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." We submit that in no circumstances can summary dismissals of such cases, as punishment for filing a timely motion, meet that standard.

Our submission is demonstrated by the facts in this case. As noted in the Statement, petitioner had not asked for any other enlargement of time, and asked for only an additional twenty days to submit his brief and record extract. Then twelve days after the expiration of the original due date for petitioner's brief, petitioner's appeal was dismissed without giving him even the opportunity to file whatever he had ready on that date and without any substantive statement of reasons. There is the undeniable appearance of arbitrariness in the swiftness, severity, and timing of the ruling and sanction in this case. Surely there is no appearance of a willful disregard of court rules in asking for a twenty day extension in advance of the due date for a brief. Consequently, the responding summary denial of the motion without a stated reason in this procedural manner violates the rules of fair play, fundamental fairness and the Due Process Clause. Moreover, because such motions are routinely granted in favor of other similarly situated litigants, the summary ruling here also violates the Equal Protection Clause of the Constitution, a clause which also limits the arbitrary exercise of public authority.

Furthermore, the injury at issue on the facts presented is substantial. The summary judicial proceedings here terminated the non-custodial parent's, petitioner's, parental visitation rights. The injury that results from lost visitation, even temporarily, during a child's formative years is by its very nature irreparable. Once lost, it cannot be recouped later. Here, these substantial parental visitation

rights were made final by the appellate court based upon their judicial denial without explanation of a timely and routine twenty day motion for extension of time. Furthermore, the denial occurred without advance notice to petitioner and at such time when timely filing of the opening brief by petitioner, in whatever imperfect draft that then existed, was no longer possible. Such circumstances, if intentionally done by the parties, would be condemned and estopped as unacceptable and fundamentally unfair. It is no more acceptable because sanctioned by judicial housekeeping rules.

In sum, there is little or no serious countervailing governmental interest in support of the challenged procedural ruling that occurred here. It cannot be seriously argued that routine requests for initial short extensions of time to file a brief should, or even may, be denied without any justification or stated reason in child custody matters after the need for the extension has become uncurable so that permanent dismissals, indeed a punitive forfeiture, of the movant's direct appeals must automatically follow. On the contrary, fundamental fairness demands that any such summary denial must occur when there is still time, even if only one day, for such default to be cured by the litigant. Nor has the Court below articulated any special but unstated reason behind its untimely use of these summary rules in child custody cases, given their grave potential to cause irreparable injury.

As Justice Blackmun observes in Lassiter, dissenting, *id.* at pp.38-40:

> ... parental rights have been deemed to be among those "essential to the orderly pursuit of happiness by free men," Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923).... Accordingly, although

> the Constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life long has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment. (citations omitted).
>
> * * * *
>
> A termination of parental rights ...leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development.
>
> * * * *
>
> The magnitude of this deprivation is of critical significance in the due process calculus.... Surely there can be few losses more grievous than the abrogation of parental rights.

He goes on to restate the Court's legal standard, *i.e.*, that the rules that apply must be rules "minimally necessary to assure fair play." *Id.* at 50.

This Court's application of the Due Process Clause makes clear that the rules minimally necessary to assure fair play for all litigants, but especially for litigants whose visitation rights with their children is at stake, do not include summary denials of motions normally granted, at a time after a default cannot be cured, and then summary dismissal of the non-custodial parent's appeal of right based upon that untimely and arbitrary denial of the parent's routine motion.

## CONCLUSION

The petition for writ of certiorari should be granted and the dismissal below summarily vacated and remanded.

Respectfully submitted,

/s/_____
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*Counsel for Petitioner*

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| **ROD SCHWARTZ** | **IN THE** |
| | **COURT OF APPEALS** |
| **v.** | **OF MARYLAND** |
| | **Petition Docket No. 323**<br>**September Term, 2004** |
| **FREEDA ISAAC** | **(No. 24, Sept. Term, 2004,**<br>**Court of Special Appeals)** |

**[ENTERED: OCTOBER 8, 2004]**

**ORDER**

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

Judge Greene did not participate in the consideration of this matter.

DATE: October 8, 2004

| | |
|---|---|
| Rod B. Schwartz, | In the |
| Appellant, | COURT OF SPECIAL APPEALS |
| v. | No. 24 |
| Freeda Isaac, | September Term, 2004 |
| Appellee. | |

**[ENTERED: AUGUST 9, 2004]**

**ORDER**

By Order dated July 9, 2004, this Court dismissed the captioned appeal for Appellant's failure to timely file a brief and record extract. By Order dated July 20,2004, Appellant's Motion to Stay Judgment was denied, The Court now having considered Appellant's Motion for Reconsideration and Reinstatement of Appeal, Appellee's Response to Appellant's Motion for Reconsideration and Reinstatement of Appeal, and Appellant's Motion for Reconsideration of Denial of Motion to Stay Judgment, it is this 9th day of August, 2004, by the Court of Special Appeals,

ORDERED that the Motion for Reconsideration and Reinstatement of Appeal and the Motion for Reconsideration of Denial of Motion to Stay Judgment are denied.

For a panel of the Court consisting of Chief Judge Murphy, Judge D. S. Eyler and Judge Barbera

CHIEF JUDGE'S SIGNATURE APPEARS ON ORIGINAL ORDER

_____

Chief Judge

IN THE COURT OF
SPECIAL APPEALS OF MARYLAND

ROD B. SCHWARTZ

Appellant

September Term, 2004
No. 00024

FREEDA ISAAC

Appellee

**[ENTERED: JULY 9, 2004]**

**ORDER**

Upon consideration of the foregoing Appellant's Motion for Extension of Time in which to file a Brief and Record Extract and after reviewing Appellee's Opposition thereto, it is hereby, the Court of Special Appeals of Maryland,

ORDERED, this 9th day of July, 2004, that the Appellant's Motion for Extension of Time in which to file a Brief and Record Extract is hereby **DENIED,** and it is further,

ORDERED, that Appellant's appeal is hereby **DISMISSED** for failure to timely file a Brief and Record Extract. *(Md. Rule 8-602(a)(7). For a panel of the Court consisting of C. J. Murphy, D. S. Eyler and Barbara, JJ.)*

CHIEF JUDGE'S SIGNATURE
APPEARS ON ORIGINAL ORDER

**IN THE CIRCUIT COURT FOR**
**PRINCE GEORGE'S COUNTY, MARYLAND**

ROD SCHWARTZ

Plaintiff

v. CAD00-07199

FREEDA ISAAC

Defendant

**[ENTERED: MARCH 5, 2004]**

**MEMORANDUM OPINION AND ORDER**

This case arose as a result of a child custody action between the parties. This Court awarded custody to the Mother, Freeda Isaac. The Father, Rod Schwartz, filed an appeal to the Court of Special Appeals. That Court remanded the case to this Court with instructions. This Court then set in the matter for a hearing on February 5, 2004, to conduct further proceedings. The parties appeared before the Court on that date. The Plaintiff was unrepresented. The Defendant was represented.

This custody action commenced on March 30, 2000, when Mr. Schwartz filed a Petition for *Ex Parte* Order for Emergency Custody Order.

On May 30, 2000, Ms. Isaac filed her Answer and Opposition to Petition for *Ex Parte* Order and her Counter Petition for Custody, Child Support, and Other Relief. On August 10, 2000, a *Pendente Lite* Order was entered, directing Mr. Schwartz to pay child support. Both an Earnings Withholding Order and more importantly, a Consent Order were entered on August 22, 2000, granting Ms. Isaac custody

of the child and allowing visitation to Mr. Schwartz. On December 13, 2000, a temporary Consent Order was entered, granting joint legal custody to Mr. Schwartz with Ms. Isaac having the sole final decision making authority with regard to the minor child.

On July 3, 2001, a Petition for Contempt was filed by Mr. Schwartz against Ms. Isaac, alleging that Ms. Isaac had failed to reasonably communicate with Mr. Schwartz regarding matters pertaining to Jared because all correspondence was made via e-mail and Ms. Isaac did not consult with Mr. Schwartz in the establishment of the child's medical appointments but rather just informed Mr. Schwartz when appointments were scheduled. Mr. Schwartz then filed a Motion to Modify Visitation or in the Alternative To Modify Decree of Custody on July 30, 2001, alleging that Mr. Schwartz had developed a close relationship with the child and that Ms. Isaac had refused to honor the terms of said Order and that she refused to discuss with Mr. Schwartz all major issues, and therefore, Mr. Schwartz should be awarded immediate custody of the minor child. On August 10, 2001, the Answer and Opposition to Petition for Contempt was filed by Ms. Isaac. On September 6, 2001 an Amended Answer and Opposition to Petition for Contempt was filed by Ms. Isaac. On September 20, 2001, Ms. Isaac filed her Answer and Opposition to Plaintiff's Motion to Modify Visitation or in the Alternative to Modify Decree of Custody. Mr. Schwartz then filed his Motion to Modify Legal Custody, Visitation, Child Support, and For Other Relief.

On December 19, 2001, the Master held a hearing on the issues of contempt, *pendente lite* modification of visitation schedule, modification of custody, child support, and attorney fees. The Court declined to find Ms. Isaac in contempt, slightly modified Mr. Schwartz's visitation to alternate weekends, denied Mr. Schwartz's prayer to modify

legal custody and child support, and ordered Mr. Schwartz to pay a portion of Ms. Isaac's attorney's fees. On December 27, 2001, Mr. Schwartz filed his Motion for Reconsideration and Motion for Reconsideration of Award of Attorney's Fees, which was denied.

On April 22, 23, 24, 29 and May 1, 2002, this Court conducted a long and exhaustive merits hearing on all issues, giving both parties, who were represented by able counsel, every opportunity to present any testimony they wished. The testimony of Dr. Jacob Roth, Dr. Betty Silon, Dr. Elizabeth Rettie, Sylvia Ann Ellison, and Mr. Schwartz were all heard on the first day of trial. Dr. Roth, the Court-appointed psychologist, testified as to the results of the custody evaluation he conducted pursuant to a Court Order. He concluded, "At this time, these are not...good candidates for a co-parenting relationship." He sarcastically but aptly opined that the chance of the parties reaching a high level of communication or trust is "better than the odds on the Power Ball," which this Court viewed as Dr. Roth's conclusion that communications for the best interests of Jared were extremely unlikely to occur.

Dr. Silon, a psychologist, testified as to the report she sent to Dr. Roth regarding her impressions of the parties. Dr. Silon testified that during the joint counseling session she "felt like there was a tension between myself [Dr. Silon] and Mr. Schwartz." She characterized Mr. Schwartz as rigid and controlling.

Elizabeth Rettie, a friend of the Mother, testified to Ms. Isaac's good character, and Jared's happiness and typical behavior of a child of his age.

Sylvia Ellison, a neighbor of Mr. Schwartz, testified as to her observations of Mr. Schwartz and his brief interaction with Jared, as well as Jared's interaction with others.

Mr. Schwartz testified as to his financial status and argued that his son's last name should be "Isaac-Schwartz."

On April 23, 2002, the testimony of Mr. Schwartz continued. Additionally, Ms. Isaac called her friend Wendy Pega, who testified as to Ms. Isaac's character and her interaction with Jared as well as the description of the church services they regularly attend. Ms. Isaac called Winston Isaac, a cousin to Jared, who testified that his Grandmother was of good health and an active, attentive caregiver to the children. Thereafter, Ms. Isaac called Marsha Auberger, a friend of Ms. Isaac, who testified as to Ms. Isaac's good character and Ms. Isaac's desire for Jared's father, Mr. Schwartz, to be a part of Jared's life despite Ms. Isaac's frustrations with Mr. Schwartz. Finally, Russell Isaac, Jared's grandfather, was called to testify. Mr. Isaac described the interactions between Ms. Isaac and Mr. Schwartz and Jared's reaction at exchanges.

On April 24, 2002, Ruby Gwen Bradley, a neighbor to Ms. Isaac, was first called to testify. Ms. Bradley testified as to her observations of Ms. Isaac's character and fitness as a parent. Additionally, she testified to the exchanges, and Ms. Isaac's desire to have Mr. Schwartz a part of Jared's life. Next, Ms. Isaac called Anna Isaac, Jared's grandmother and caretaker. Mrs. Isaac testified as to Jared's daily schedule, exchanges, and events around Jared's birth. Ms. Isaac then began her testimony.

On April 29, 2002, testimony of Ms. Isaac continued. On May 1, 2002, Ms. Isaac completed her testimony, and Mr. Schwartz testified again. Counsel then gave closing arguments.

On June 7, 2002, the Court entered its Order dated May 31, 2002, granting primary physical custody and sole legal custody of Jared to Ms. Isaac with Mr. Schwartz having

visitation. Additionally, the-Court ordered Mr. Schwartz to pay child support and attorney's fees of Ms. Isaac.

On June 7, 2002, a Motion to Enter Judgment and Affidavit was filed by Ms. Isaac. On June 20, 2002, the Response to Motion to Enter Judgment was filed by Mr. Schwartz. Thereafter, the Reply in Support of Motion to Enter Judgment was filed by Ms. Isaac. Mr. Schwartz then filed his Notice of Appeal on June 21, 2002.

On August 14, 2002, a Court Order dated August 13, 2002, was filed, ordering an immediate monetary judgment against Mr. Schwartz.

Oral arguments on Mr. Schwartz's appeal were heard by the Court of Special Appeals on June 5, 2003. Thereafter, on June 26, 2003, the Court entered its Opinion, which vacated this Court's judgment and remanding the case for further proceedings.

Mindful of the remand, this Court has reviewed the Opinion of the Court of Special Appeals. This Court has also reviewed the entire record of the case, including the testimony of the witnesses, exhibits and arguments by both counsel. Finally, this Court brought in the parties and their counsel for further hearing on this matter, partly to determine whether further evidentiary proceedings were needed and partly for closure of this long proceeding. The Court has also reviewed all applicable law to ensure that Jared's best interests are served here.

Based on the foregoing review, this Court finds no need for an additional hearing on the matter. This Court is not convinced that the Court of Special Appeals applied the best interests standard with regard to its review of this Court's custody award and visitation award. The Appellate Court argues that this Court should have used the

modification standard in determining its award of joint or sole custody. However, as the initial Consent Order between the parties was merely a temporary order and as such the correct standard was the best interests of the child. In retrospect, and after an exhaustive review of the entire trial, the bottom line is that in evaluating the evidence presented at trial, this Court would have reached the same conclusion regardless of whether the best interests test was applied or the modification standard was applied.

In *Leary v. Leary,* the Court of Special Appeals held that when a pendente lite order for custody has been issued, it is not necessary to show a change of circumstances to modify that order as long as there has not been a final adjudication of the custody dispute. The proper standard the court should use to determine a change of custody from a pendente lite order is and continues to be what is in the best interest of the child. Leary v. *Leary,* 97 Md. App. 26, 627 A. 2d 30 (1993).

Clearly the December, 2000, Consent Order was meant to be temporary as 1) there had been no final hearing on the matter and 2) the Order itself states that visitation will be readdressed in January, 2002, in an effort to determine what is in the best interest of the child.

The Court of Special Appeals reached their conclusion based on the use of the wrong standard for a custody determination. As there was no final order regarding the custody of the minor child, the necessary standard is the best interests of the child, which this Court respectfully finds, from the hearing on the merits, has been met decisively.

Even if this Court found that there had been a change in material circumstances, this Court would still be obligated to then apply the best interests test to determine

what custodial arrangement was in the best interests of Jared.

Following the criteria set forth in *Montgomery County v. Sanders*, 38 Md. App. 406, 381 A.2d 1154 (1977), the following are the reasons why the Court awarded sole legal custody to Ms. Isaac as being in the best interests of this minor child.

The Fitness of the Parents

All of the witnesses, including Mr. Schwartz, testified as to the fitness of Ms. Isaac as a good parent. The testimony revealed that Ms. Isaac is a caring and gentle mother, Ms. Isaac has a warm and affectionate relationship with the child, there is a strong bond between Ms. Isaac and Jared, and that "it's a perfect mother-son relationship."

The Character and Reputation of the Parents

Again, I find the testimony of the all of the witnesses decisive as to the good character of Ms. Isaac and her ability to be a good parent. Witnesses described Ms. Isaac as genuine, caring and even tempered.

In contrast, certain witnesses described Mr. Schwartz as hostile, disrespectful, and even weird. Ms. Isaac testified that Mr. Schwartz can be angry and nasty in his dealings with her. Dr. Roth testified that Mr. Schwartz is pushy, disrespectful and hostile. Dr. Silon described Mr. Schwartz as rigid and controlling. This Court observed those traits in Mr. Schwartz's testimony, as well. While it is clear that Mr. Schwartz loves his son, it was also clear to this Court that Mr. Schwartz appeared to be engaged in a battle against Ms. Isaac, as opposed to looking out for Jared's best interests. To his credit, Mr. Schwartz did testify complimentary, at times, towards Ms. Isaac's parenting skills, further reinforcing Ms. Isaac as a fit and proper parent for Jared.

The Psychological Fitness of the Parents

This Court finds the testimony of Dr. Roth, once again, to be most revealing. Dr. Roth testified that Mr. Schwartz tends to be frustrated, angry and has difficulty in accommodating situations which he feels are unjust or forced upon him. Dr. Roth further testified that Mr. Schwartz has difficulty accepting limits and his frustration with said limits may manifest itself into resistance.

All of the testimony regarding Ms. Isaac illustrated the positive relationship between Ms. Isaac and Jared. Dr. Roth stated that Ms. Isaac is a competent and appropriate parent.

The Desire of the Parents to Have Custody

Ms. Isaac has been the primary caregiver to Jared since he was born, and there is no question of her desire and ability to raise the child. Mr. Schwartz, on the other hand, initially requested that Ms. Isaac have an abortion and denied paternity. Only recently did Mr. Schwartz seek custody. This Court has weighed this factor into the best interests test. It is additional evidence of how far apart the parties are on what is in Jared's best interests.

The Potential for Maintaining
Natural Family Relations

Ms. Isaac and a number of witnesses all testified that Ms. Isaac had always wanted Mr. Schwartz to be part of Jared's life despite the tension between the parents. Wendy Pega, Marcia Auberger and Ruby Bradley all testified to this fact. Even Mr. Schwartz admitted that the only time Ms. Isaac had ever denied him visitation was because Jared was ill, and that she offered to make up the missed visitation time.

This Court has serious doubts as to whether Mr. Schwartz would be so generous based on the testimony that at one time he threatened to take the child away from Ms. Isaac and she would never see him again. This is yet a further indicator to this Court that joint legal custody is not appropriate and is also another important barometer to this Court that Ms. Isaac has consistently and will continue to include Mr. Schwartz in Jared's life.

The Material Opportunities Affecting the Future Life of Jared

All the testimony indicated that Jared is a happy child. There was no testimony that the child would lack for material opportunities from either parent. It was clear to this Court that both parties love Jared.

There was testimony, however, that Jared's extended family is mainly from his mother's side. Ms. Isaac is very close with her family, and Jared's maternal grandmother is his day care provider. Ms. Isaac is an active church member and is attempting to raise Jared within the church.

Mr. Schwartz admitted that he is not as close to his family as Ms. Isaac is to hers and that Jared has grown used to spending time with members of Ms. Isaac's family.

The Residences of the Parents and the Opportunity for Visitation

The testimony indicated that both parties have suitable homes in which to raise a child. Although the parties live 30 to 40 minutes apart, which for joint custody purposes puts them at a considerable distance from each other and in different school systems, reasonable visitation to either party would not be an issue based on geographic distance.

The Length of the Separation of the Parents

The parties have never been married nor have they lived together. While seemingly unimportant, this is an often overlooked factor that this Court takes very seriously. The fact that the parties never lived together as a family with Jared, and therefore, never had the opportunity to make joint or shared decisions on issues affecting Jared is important.

Prior Voluntary Abandonment
or Surrender of Custody of Jared

The testimony of both Ms. Isaac and Mr. Schwartz was that Mr. Schwartz walked away from his relationship with Ms. Isaac and responsibilities to his unborn child upon learning of her pregnancy. Mr. Schwartz admitted that he had requested Ms. Isaac get an abortion. He further admitted that he refused to sign an acknowledgment of paternity after Jared was born. Mr. Schwartz testified that to date he has not put his name on Jared's birth certificate because he has other things to do.

Despite Mr. Schwartz's lack of desire to be a father, Ms. Isaac testified that she called him the day after giving birth and has only wanted him to acknowledge he is the father.

This Court has weighed all of the testimony and exhibits accepted into evidence as to the best interests of Jared. This Court finds the testimony of Ms. Isaac to be more credible than Mr. Schwartz on issues relating to what is in Jared's best interests. This Court has no doubt that Mr. Schwartz loves his son and wishes to spend time with him. That is commendable and this Court structured Mr. Schwartz's visitation to reflect it. However, I find the testimony of Dr. Roth, the Court-appointed psychologist,

most persuasive. Dr. Roth found Ms. Isaac to be an entirely fit and proper parent. Dr. Roth further testified that as Ms. Isaac has always had sole physical custody since the child was born, it would adversely affect the child to remove him from her care at this time.

As to the issue of joint legal custody, there are many factors this Court could consider in making a decision whether to award the parties joint legal custody. The most important factor, however, is the parents' ability to communicate effectively with each other. As stated in Taylor v. Taylor, 3 06 Md. 290, 508 A. 2d 964 (1986), "Rarely, if ever, should joint legal custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child, and then only when it is possible to make a finding of a strong potential for such conduct in the future."

It is absolutely clear to the Court that there has never been any productive communication between the parents as it relates to Jared. In fact, both parties testified that there were significant communication problems between them. Mr. Schwartz admitted calling the police on Ms. Isaac on two occasions, as well as taping all of their phone conversations, without Ms. Isaac's consent. At the time of the trial held by this Court, all communication between the parties was via e-mail.

Again, the testimony of Dr. Roth is helpful in this matter. Dr. Roth testified that for shared custody to work it requires a high degree of cooperation, trust and communication. When asked what the chances were of the parties reaching a high level of communication or trust with the help of a parent facilitator, Dr. Roth, seeking to find the glass half-full instead of half-empty, would only say, "It's better than the odds on the Power Ball," an assessment that does not give this Court a great deal of confidence.

After a review of the testimony, including the recommendation of Dr. Roth, I find that it is the best interests of the child to award primary physical custody and sole legal custody to Ms. Isaac.

As to the issue of visitation, this Court finds that the current order, which in and of itself was to be temporary, giving Mr. Schwartz ¾ of all weekends, every Saturday, is not equitable and therefore recommends trimming it back. As to midweek visitation, the testimony indicated that the mid-week visitation was disruptive to the child and therefore should be terminated. The testimony revealed that Jared is having difficulty with the inconsistency that mid-week visitation creates with its bouncing back and forth between the parents.

It is my understanding that the Mr. Schwartz filed a Motion to Modify Visitation (Holidays) which was heard by Judge Weatherly on March 26, 2003. Judge Weatherly's Order dated April 3, 2003, is incorporated herewith as part of this Court Order.

Attorney's Fees

This Court has reviewed the Court of Appeals direction to clarify how the amount of attorney's fees awarded to Ms. Isaac was determined. The Court of Special Appeals did not challenge this Court's findings on the financial resources of the parties, the needs of the parties and whether there was substantial justification for bringing, maintaining or defending the proceeding. It is clear to this Court that Ms. Isaac has been justified in each filing she has made to this Court and to the Court of Special Appeals. For the most part, she has only-responded to the pleadings, motions and appeals filed by Mr. Schwartz.

Ms. Isaac testified that as of the date of the trial her attorney fees amounted to well over $68,000.00, the total of which did not include preparation and five days of trial. While it is true that the parties agreed that each would pay their own attorney's bills through October 12, 2000, Ms. Isaac introduced documentation to establish what bills were excluded from her request, either by the terms of the parties' agreement or by previous payment by Mr. Schwartz. Therefore, this Court's prior award of $10,000 was reasonable. There were no double calculations.

All of Ms. Isaac's counsel fees are reasonable and were clearly necessary to protect Ms. Isaac's legal rights, as well as those of Jared.

This Court is also mindful that no guardian ad litem was ever appointed in this case, and therefore, Ms. Isaac was acting in that capacity in numerous respects, making her counsel fees eminently reasonable.

At the original trial, the parties also each produced evidence by way of both testimony and exhibits of their financial resources, which this Court has reviewed and considered.

Having considered the evidence, exhibits, statutes and case law relating to counsel fees, this Court believes that Ms. Isaac is entitled to the sum of $10,000.00 as an award of counsel fees against Mr. Schwartz.

IT IS THEREFORE, this 5 day of March, 2004, by the Circuit Court for Prince Georges County, Maryland,

ORDERED, that sole legal and physical custody of Jared Philip Isaac-Schwartz is awarded to Freeda Isaac; and it is further

ORDERED, that Rod Schwartz is granted visitation with Jared as follows: Rod Schwartz is granted the holiday and other visitation set forth by the Honorable Julia Weatherly of this Court, and her Order is incorporated hereto; and it is further

ORDERED, that judgment for counsel fees is hereby entered in favor of Freeda Isaac against Rod Schwartz in the sum of $10,000.00; and it is further

ORDERED, that the moneys presently held pursuant to the garnishment issued in this case by the garnishee shall be immediately turned over to Freeda Isaac.

/s/ E. Allen Shepherd
E. ALLEN SHEPHERD, JUDGE

Copies sent by Court to:

Harry B. Siegel, Esquire
10211 Wincopin Circle, Suite 110
Columbia, MD 21044

Mr. Rod Schwartz
6501 44th Avenue
University Park, MD 20782

/s/ Ruth L. Jones 3-5-04
Ruth L. Jones
Executive Administrative Aide

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 00827

September Term, 2002

ROD SCHWARTZ

v.

FREEDA ISAAC

Kenney,
Eyler, Deborah S.
Greene,
JJ.

Opinion by Greene, J.

Filed: June 26, 2003

**[ENTERED: JUNE 26, 2003]**

Rod Schwartz, appellant, seeks review of the June 7, 2002 Prince George's County Order, awarding custody of the parties' minor child to Freeda Isaac, appellee, granting appellant a specific schedule of visitation, setting a child support amount, changing the child's name, and ordering appellant to contribute $10,000 toward appellee's attorney's fees.[1]

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[1] We note at the outset that appellee has moved twice to dismiss this appeal, Her first request was granted on December 20, 2002, because of appellant's failure to file a brief and record extract in compliance with

Appellant raises four questions for our review, which we have condensed and rephrased:

I. Whether the court erred by awarding custody to appellee?[2]

II. Whether the court erred by awarding attorney's fees to appellee?[3]

## FACTS

Appellant and appellee were never married. They started dating in 199 6 and continued seeing each other for three years. The relationship ended in 1999, when appellee told appellant she was pregnant and appellant did not want to marry her. One child was born to the parties, namely, Jared Isaac-Schwartz, born on September 25, 1999.

The parties have never lived together and Jared has always lived with appellee. Appellant was 48 years old at the time of trial and lives in University Park, Maryland- He

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the rules. The appeal was reintstated later, however, when appellant filed the brief and record extract. Appellee filed another motion to dismiss alleging that the record extract and brief were deficient, that appellant should have served the Attorney General with a copy of these proceedings, and that the Court previously warned appellant that he risked dismissal if he did not file a brief and record extract "in full compliance with all the applicable Maryland Rules." We find no merit in any of appellee's contentions and deny her second motion to dismiss appeal. Md. Rule 8-501 (m).

[2] Related to this issue, appellant questions whether the court properly stated its reasons and findings of fact, whether the court's conclusions were wrong in light of the testimony of two psychologists, and whether the court "excessively infringed upon appellant's constitutionally protected rights to participate in the raising of his child."

[3] Appellant questions whether the court properly stated its reasons and findings of fact.

is a writer and editor employed by the U.S. Department of Education, earning $61,263.00 per year. Appellee was 39 years old at the time of trial and lives in Bowie, Maryland. She is a veterinarian employed by the U.S. Department of Agriculture Animal and Plant Health Inspection Service, earning $67,000 per year.

After the baby was born, appellee permitted appellant to see him twice a week for a couple of hours at appellee's mother's home. This visitation arrangement lasted until November, 1999, when appellee informed appellant that there would be no more visits without appellant speaking to appellee's attorney.

On March 30, 2000, appellant filed an *ex parte* request for custody in the Circuit Court for Prince George's County. On May 30, 2000, appellee filed an answer and opposition to the *ex parte* request and filed a petition for custody and child support. On August 10, 2000, the court signed a *Pendente Lite* Order, directing appellant to pay child support. Thereafter, on August 22, 2000, the parties consented to an order, in which the court granted *pendente lite* sole custody to appellee, and provided for visitation for appellant.[4]

On October 12, 2000, the case was called, according to the hearing sheet, "to put [the] settlement agreement on the record." The case was reset for disposition on November 13, 2000. The hearing was again continued and rescheduled for December 7, 2000. On December 13, 2000, another consent order was entered, granting joint legal custody to the parties, sole physical custody to appellee, and giving her the final decision making authority regarding the minor child. This order appears to the Court to be the initial

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[4] Pursuant to the order, entitled "Consent Pendente Lite Order," appellant's visitation was increased gradually, in which the final phase started in September, 2000, and included Tuesday and Thursday evenings and all day Sundays.

decision on the merits regarding custody in this case.[5] The first two paragraphs of the order state:

> The above captioned matter having come before this Court for a hearing on October 12, 2000, on the issues of paternity, legal and physical custody, visitation, child support, and child support arrearages, and the parties having put their agreement on the record in this Court, and it appearing that parties [sic] agree to the following, it is this 13th day of December, 2000, by the Circuit Court for Prince George's County, Maryland,
>
> ORDERED, that the plaintiff, Rod Schwartz, and the Defendant, Freeda Isaac, shall have the joint legal custody of their minor child, Jared Philip Isaac, born on September 25, 1999, with final decision-making authority to Ms. Isaac. . .

In addition, the order provided appellant with another graduated visitation schedule, culminating in September, 2001, with alternate weekends, alternate Tuesdays overnight, other Tuesdays from five until seven, and every Thursday from 5:30 until 7:00. The order also provided for holiday visitation schedules, set child support at $519.40 per month, and ordered each party to pay their own attorney's fees incurred on or prior to October 12, 2000.

On July 3, 2001, appellant filed a petition for contempt, alleging that appellee did not communicate with him properly regarding matters relating to the parties'

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5 Appellee characterizes this order as a "temporary" consent order. The *pendente lite* or temporary order resulting from the initial filings in the case (appellant's initial request for custody and appellee's counterclaim for custody), however, was the August 22, 2000, order already discussed.

minor child. On July 30, 2001, appellant filed a "Motion to Modify Visitation or in the Alternative, to Modify Decree of Custody," alleging, *inter alia,* that the parties had joint legal custody of Jared, that appellant had developed a close relationship with Jared, and that the current visitation schedule was not in the child's best interest. In addition, he alleged that appellee did not communicate with him sufficiently. (Appellant asked the court to let him have Jared "at least every other week" or, in the alternative, to award him custody of Jared.

Appellee answered the petition for contempt on August 10, 2001. On September 6, 2001, appellee amended her answer to the petition for contempt. On September 20, 2001, appellee filed an answer and opposition to the motion to modify, in which she admitted that the parties had joint legal custody. Appellee asked that she be awarded sole physical and legal custody - both *pendente lite* and permanently, that appellant's visitation be reduced, that she be awarded child support in accordance with the guidelines, and that appellant pay her counsel fees incurred in this action. Appellant also filed a "Motion to Modify Legal Custody, Visitation, Child Support, and For Other Relief."

In October, 2001, both parties requested that psychological testing be completed on the other party. On November 8, 2001, the case was scheduled for a *pendente lite* hearing, at which time the parties agreed that a psychological custody evaluation was in the child's best interest and would be helpful to the court. The hearing proceeded on appellant's petition for contempt, request to modify custody and visitation, and appellee's motion to modify child support.

On December 19, 2001, the court issued an opinion on the record and signed an order. The court declined to find appellee in contempt or to modify the custody or child

support order. The court did modify the visitation schedule, *pendente lite,* granting appellant visits every other weekend from 10:00 a.m. on Saturday to Monday at 8:00 a.m., and all other Saturdays from 10:00 a.m. until 6:00 p.m. The court denied the requests to modify custody and child support, *pendente lite.* Finally, the court ordered appellant to contribute $2,100 to appellee towards her attorney's fees and noted that the "modification of custody shall be scheduled for a three-day trial . . . ."

Thereafter, appellant filed motions for reconsideration. Those motions were denied and on March 25, 2002, the court awarded additional attorney's fees ($240.00) to appellee for having to oppose the motions.

Despite appellant's attempt to postpone the trial, the case came before the court for a trial on the merits on April 22, 23, 24, 29, and May 1, 2002.[6] Appellant called Dr. Roth, the court-appointed custody evaluator, who testified that he met with the parties individually and jointly, and observed both of them with Jared. He noted that he believed appellant was capable of caring for and providing for Jared and that appellee was a fit and proper parent. He did not recommend a change in physical or legal custody, but also noted that the parties at that time were "not good candidates for a co-parenting relationship."

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6 In view of the procedural facts in this case, it is clear to the Court that the hearing that took place was for *modification* of custody and visitation, and was not an initial determination of custody, despite the arguments of counsel that the initial custody order (December 13, 2000) was a "temporary" one.

Dr. Roth discussed the parties' difficulty communicating with each other[7] and recommended that the court appoint a "parenting consulting facilitator" to help them communicate with each other. When asked about the possibility of an equal time custody arrangement in this case. Dr. Roth responded:

> Again, I will go back to the context of my conclusions that I believe that that is something as a goal to move towards, but that given the level of conflict and distress at this point that that needs to be taken into consideration, and to be provided in a systematic and guided fashion so as to minimize any stress or trauma for Jared.

When discussing the parties' abilities for co-parenting, Dr. Roth noted that there is a "reasonable probability, that's a good qualification there, that with the right interventions they could make some progress in this direction."

Dr. Roth prepared a fifteen-page report for the court, discussing his recommendation that the court appoint a facilitator and his recommendation that appellant be given more time with Jared. In particular, Dr. Roth recommended that appellant have visitation on alternating weekends and one overnight during the alternate week. He also recommended that appellant have significant vacation time

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[7] According to Dr. Roth, the difficulties include appellee's insistence at times that the parties only communicate by e-mail or leaving phone messages at certain times, and both parties unwillingness to listen to each other and appreciate the other's point of view. In addition, appellant testified that he told appellee that he would tape their phone conversations, which led to her insistence that they not talk by phone. He noted that appellant decided to tape the conversations once appellee accused him of verbally abusing her over the phone.

with Jared.[8] Dr. Roth's last recommendation included the suggestion that the court assess the parties' progress in six months and that joint legal custody continue until that time.[9]

Appellant's other witnesses included Dr. Betty Siler (a former counselor of appellee's). Dr. Elizabeth Rettie (a friend of appellee's), Sylvia Ellison (a neighbor of appellant's), and appellant. Appellee called Wendy Pega and Marsha Auberger (two friends), Winston Isaac (her nephew), Russell and Anna Isaac (her parents), and Ruth Bradley (a neighbor).

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8 Specifically, Dr. Roth noted:

> It is recommended that with the guidance of the [facilitator] that Jared spends occasional extended weekends with his father moving toward two one-week vacations with his father for 2002, and then moving to a plan which would allow for two two-week periods of vacation time with his father for 2003.

9 While Dr. Roth discussed some of the aspects of his report during his testimony, it appears chat the court may not have had an opportunity to read the report prior to rendering a decision. At the start of closing arguments the court asked why the report was not in the file. Both attorneys expressed surprise that Dr. Roth had not provided the court with a copy of his report when he had provided counsel with one. Counsel for appellee noted that she had marked it as an exhibit, but the court clerk advised everyone that the document was not in evidence. Counsel for appellant then moved to have it admitted without objection and it was received. At the end of appellee's counsel's closing remarks, counsel noted: ". . . and there is another thing I want to talk about. Dr. Roth's report, and since Your Honor hasn't seen it, you may need time to look at it." Counsel went on to point out some passages on page nine. Two pages in the transcript following counsel's comment, the court rendered its opinion. There is no indication that the court took a recess to read the expert's report prior to issuing its decision.

On the last day of trial, after five days of taking testimony, the court rendered a short decision on the record that included the following pertinent remarks regarding custody and visitation:

> Well, it's pretty clear that the- there's no communication between Mr. Schwartz and Ms. Isaac. And the Court is not going to change the custody. We're going to give primary physical custody to Ms. Isaac and sole legal custody to Ms. Isaac because it's pretty clear that they fight, they argue and can't agree on anything. So sole legal custody of the child will be with Ms. Isaac. The visitation schedule will be alternative weekends, beginning at 5:30 on Friday to 5:30 Sunday until the summer. Beginning in July and for July and August it will be 5:30, alternative weekends 5:30 Friday until 8:00 [a.m.] Monday . . . . It will be three overnights and then in September it will return to the 5:30 Friday to 5:30 Sunday. On those weeks that Mr. Schwartz does not have visitation, he will have the opportunity for telephone visitation with his son, Wednesday afternoon between the hour of 4:00 and 5:30.
>
> . . . Beginning in the summer of 2003, Mr. Schwartz will have the opportunity to have Jared with him for [two] weeks[.] [H]e'll be [three] going on [four] at that point.

The court made no other comments in its decision regarding custody or visitation.[10]

With regard to attorney's fees the following colloquy occurred:

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10 During the closing argument of appellee's counsel, the court engaged in the following colloquy with appellee's counsel:

Court: What was the longest period of time that he's had Jared, two?

Counsel: Two overnights. And we've had Jared calling home and saying he wants to come home and we don't know why.

Court: Well that happened on one occasion.

Counsel: It happened once, I'm saying two other times crying.

Court: In fairness, that only happened on one occasion.

Counsel: We don't know what happens when he's there. When he is older, not even that much older.

Court: Well, you know that, nothing horrendous has happened, because when he is brought back he's a happy, healthy child.

* * *

Court: And you know, I could almost take judicial notice of this fact that visitation has - there are problems with visitation . . .

* * *

Counsel: That's the first couple of times. Your Honor. Two years later with Jared still screaming and trying to get back to the house causes some concerns.

Court: That's why in fairness, there was no visitation for a long period of time. And there hasn't been any regular overnight visitation until rather recently. There was sporadic – it wasn't this regular every other week visitation. But in any event, go on, I'm sorry I keep interrupting.

Counsel: Not at all Your Honor. In September of 2001 he started overnight visits. He saw Mr. Schwartz two additional times on alternate weekends. He saw him frequently. Ms. Isaac wanted that to go well. Her concern is it hasn't gone well.

Court: Part of the problem then in fairness is there is [sic] also those mid-week . . . that was destructive rather than constructive . . . And I think everybody can see why that would be disruptive.

> Court: . . . The Court will order that Mr. Schwartz contribute to the attorney's fees the sum of $10,000. And that be reduced to a judgment unless paid on or before June 1, 2002. I'll sign an order to that effect.
>
> Counsel: Your Honor, Your Honor I have a hard time with the $10,000 judgment Your Honor since Ms. Weisberg's exhibit into this Court was less than $9,000.00 currently owing for this case Your Honor. The numbers that she was tossing out were the numbers since the beginning of this case, Your Honor. I submit to you, initially justified. My client filed for custody when this case began because he had no visitation.
>
> Court: Alright. I've taken into consideration all of the factors . . . I mean there was - there was a tantamount denial of paternity.

On June 7, 2002, the court entered its written order, dated May 31, 2002. On that same day, appellee filed a motion to enter judgment against appellant for $12,340, representing the previous awards of attorneys fees and the award just made by the court on May 31, 2002. Appellant responded to the motion to enter judgment on June 20, 2002. Appellant noted this appeal on June 21, 2002. On August 13, 2002, the court granted appellee's request and entered a judgment against appellant, in the amount of $12,340. Additional facts will be discussed as needed throughout this opinion.

## DISCUSSION

Appellant argues that the court should not have granted appellee's request to modify the custody of Jared from joint legal custody to sole legal custody for appellee, and that the court should not have reduced his visitation. In addition, appellant argues that the court erred by ordering appellant to contribute $10,000 toward appellee's attorney's fees.

### I. Custody

As the Court noted in *Viamonte v. Viamonte*, 131 Md. App. 151 (2000), Md. Rule 8-131(c)[11] and case law applying that rule's predecessor to custody actions, require this Court to give great weight to the trial court's findings of fact and to apply the harmless error standard to questions of law. *Id.* at 157 (citing *Davis v. Davis*, 280 Md. 119, 124-26 *cert. denied*, 434 U.S. 939 (1977)). In addition, the Court in Viamonte noted that

> on the ultimate issue of which party gets custody - the application of law to the facts - we will set aside a judgment only on a clear showing that the chancellor abused his discretion.

131 Md. App. at 157.

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11 Md. Rule 8-131(c) states:

> When an action has been cried without a jury, the appellate court will review the case *on* both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

"The guiding principle of any child custody decision, whether it be an original award of custody or a modification thereof, is the protection of the welfare and best interests of the child." *Shunk v. Walker,* 87 Md. App. 389, 396 (citing *Queen v. Queen,* 308 Md. 574, 587 (1987); *Ross v. Hoffman,* 280 Md. 172, 175 (1977); *Skeens v. Paterno,* 60 Md. App. 48, 61, *cert. denied,* 301 Md. 639 (1984); *Vernon v. Vernon,* 30 Md. App. 564, 566 (1976). The trial court must weigh several factors when resolving a custody dispute and deciding what is in the child's best interest,

> including, inter *alia,* fitness of the parents, character and reputation of the parties, desire of the natural parents and agreement between the parties, potentiality of maintaining natural family relations, preference of the child, material opportunities affecting the future life of the child, age, health and sex of the child, residences of the parents and opportunity for visitation, length of separation from the natural parents, and prior voluntary abandonment or surrender.

*Shunk v. Walker,* 87 Md. App. 389, 397 (1991).

When reviewing a request for modification of custody, the trial court must consider whether there has been a "change in circumstances affecting the welfare of the child." *Id.* at 401.[12] In addition, to warrant a modification, "a

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12 See also *McCready v. McCready,* 323 Md. 476, 481 (1991)(seating that stability for the child and an interest in reducing re-litigation of custody questions are the reasons "for ordinarily requiring proof of a change in circumstances to justify a modification of an existing custody order").

party must establish that the modification is necessary to safeguard the welfare of the child." *Id.* at 398. The Court of Appeals has stated that

> [a]n order determining custody must be afforded some finality, even though it may subsequently be modified when changes so warrant to protect the best interest of the child. As we said in *Hardisty v. Salerno,* 255 Md. 436, 439, 258 A.2d 209 (1969), "[w]hile custody decrees are never final in Maryland, any reconsideration of a decree should emphasize changes in circumstances which have occurred subsequent to the last court hearing."

*McCready,* 323 Md. at 481.

Whether the alleged changes are sufficient to warrant a change of custody "necessarily requires a consideration of the best interest of the child." *Id.* at 482.

The father in *McCready* argued that he did not have to show a change in circumstances because the custody decree he sought to modify had been the result of an agreement by the parties "and did not represent the considered judgment of a chancellor arrived at after a full adversary hearing." *Id.* at 482-83. The Court of Appeals rejected that argument and noted that custody orders entered by consent of the parties have been treated as final orders, subject to modification upon a sufficient showing of change. *Id.* at 483 (citing *Raible v. Raible,* 242 Md. 586, 594-95 (1966)). The Court concluded that it "[is] not persuaded that the law of Maryland in this respect should be changed." *Id.*

The December 13, 2000, order of custody and visitation that both parties sought to modify in the case at bar was entered by consent. In light of *McCready* and the other cases cited, we note that the circuit court should have considered whether there was a material change in circumstances affecting the welfare of the child and whether the new custody and visitation order was in the best interest of the child before modifying custody from joint legal custody to sole legal custody to appellee.

We use the phrase "should have considered" because we cannot discern, based on the court's opinion from the bench or the written order that followed, what the court considered before changing legal custody and reducing appellant's visitation. Md. Rule 2-522(a) requires the trial court to "dictate into the record or prepare and file in the action a brief statement of the reasons for the decision . . . ." The court's opinion in this case has not adequately explained what change in circumstances affecting Jared's welfare required the change in legal custody or the reduction in appellant's visitation.

While the court did state at the start of its oral opinion that the parties do not communicate and that they fight, it appears from our review of the record that the acrimony and lack of communication between these parties existed *before* they entered into the consent agreement regarding Jared's custody and visitation in December 13, 2000. Apparently they decided then that the differences between the two of them would not stop them from cooperating on matters of importance relating to their son. Even so, it may well be that the level of communication between them has worsened significantly since December 13, 2000, and that they are not now good candidates for joint

legal custody. The trial court will have an opportunity to consider that factor and all the other factors mentioned in *Taylor v. Taylor*, 306 Md. 290 (1986), on remand.[13]

Moreover, the court's opinion does not state that the changes made to legal custody and visitation[14] are in Jared's best interests, nor does it adequately explain how the court resolved the ultimate issue of what is in Jared's best interest. The court's opinion itself articulates no reasons for reducing appellant's visitation.

In support of her position that the court's decision should be affirmed, appellee points to comments the court made during her counsel's closing arguments.[15]

We cannot tell from that discussion what the court's findings regarding visitation were. The court noted that Jared was a happy, healthy child when returned from overnight visits with his father. The court also remarked about the "destructive" or "disruptive" nature of "these mid-

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13 Those factors include: the capacity of the parents to communicate and reach shared decisions affecting the child's welfare, the willingness of the parents to share custody, the fitness of the parents, the relationship established between the child and each parent, the preference of the child, the potential disruption of the child's social and school lives, geographic proximity of the parental homes, demands of parental employment, age and number of children, sincerity of both parents' requests, financial status of the parties, and benefit to the parents. *Taylor*, 306 Md. at 304-311.

14 Visitation, like custody, is governed by the best interests standard. *Boswell v. Boswell*, 352 Md. 204, 219 (1998). A non-custodial parent has a right to "liberal visitation with his or her child 'at reasonable times and under reasonable conditions.'" *Id.* at 220 (quoting *Myers* v. *Butler*, 10 Md. App. 315, 317 (1970)). Any limits placed on visitation must be reasonable. *Boswell*, 352 Md. at 220 (citing *North v. North*, 102 Md. App. 1, 12 (1994)).

15 See footnote 9.

week . . . ." The judge did not finish his sentence. We do not know if he was expressing an opinion that the drop-offs and pick-ups of the mid-week visitations were problematic or if the mid-week visits themselves were somehow detrimental to the child.[16] *See Boswell v. Boswell,* 118 Md. App. 1, 33 (1997), *aff'd,* 352 Md. 204 (1998)(vacating an order restricting a parent's visitation because the court articulated no reasons for the restriction other than the "inappropriateness" of the parent's homosexual relationship, and it failed to state on the record how the children might be harmed by exposure to the relationship). Similarly, in the case at bar, the court has failed to articulate how Jared might be harmed from continuing to have the same amount of visits with his father or, more precisely, why it is in Jared's best interests to have less visitation with his father. In fact, the report of Dr. Roth, while clearly not binding on the court, recommended that Jared have *increased* visitation with appellant. The court did not mention Dr. Roth's testimony or recommendations in its opinion. As we noted earlier, it is not clear that the court even had an opportunity to read Dr. Roth's report before making a final ruling.

On remand, the circuit court must articulate the reasons for its decision to modify custody and visitation, in light of the relevant standards. As noted by the Court of Appeals in *Boswell,* Md. Rule 2-522(a) "mandates that the court state an objective to be served by the restriction [on visitation] and then detail the facts furthering the objective."

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16 There was testimony that transitions of the child from one parent to the other had been difficult. As noted in Dr. Roth's report, however, after changing the method of transition, "both parents report that this process has been going relatively well."

*Boswell,* 352 Md. at 223. Certainly, the same can be said for the court's decision to modify custody.[17]

## II. Attorney's Fees

Appellee argues that we cannot review the attorney's fee award because it was not a final judgment at the time appellant noted his appeal. She argues that the judgment for fees was not final because the money judgment was not entered against appellant until after the appeal was noted. We disagree with appellee.

Md. Rule 2-602(a) states:

> Generally. Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action: (1) is not a final judgment; (2) does not terminate the action as to any of the claims or any of the parties; and (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

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17 In view of the fact that Jared is very young and that much time has passed since the hearing on these issues, on remand the court should consider holding an evidentiary hearing to determine what the change in circumstances are and what custody and visitation arrangements are currently in Jared's best interests.

A judgment must contain three attributes in order to be a final judgment:

> (1)it must be intended by the court as an unqualified, final disposition of the matter in controversy, (2) unless the court properly acted pursuant to Md. Rule 2-602(b), it must adjudicate or complete the adjudication of all claims against all parties, and (3) the clerk must make a proper record of it in accordance with Md. Rule 2-601.

*Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989).

The court's order dated June 7, 2002, from which appellant filed a timely notice of appeal, has all the attributes just noted. The order was properly entered by the clerk and it finally adjudicated all the issues before the court, including the request for attorney's fees:

> Plaintiff shall pay to the defendant the sum of $10,000 toward her attorney fees incurred in this action, in addition to any attorney fees previously awarded, and if said $10,000 is not paid by June 1, 2002, then same shall be reduced to and entered as a judgment against Plaintiff.

The fact that the order also includes the self-enforcing mechanism of entering a judgment against Plaintiff if he does not pay does not deprive the order of its finality for purposes of appeal. See *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41, 43 (1989) (noting that in order for a judgment to be an unqualified final disposition of the case, the ruling must be complete "except as to something that would be regarded as collateral to the proceeding" or that would aid in enforcing a prior judgment). To rule otherwise would

force litigants in this situation to file two appeals; one after entry of the order resolving custody, visitation, and fees, and another after entry of the money judgment regarding fees, if that judgment was entered more than thirty days after the entry of the first order. That would fly in the face of the underlying policy of the final judgment rule, namely, that piecemeal appeals are disfavored. *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 713 (2000).

The trial court has authority to award counsel fees to a litigant involved in a dispute over child custody, support or visitation under section 12-103[18] of the Family Law Article. There are three other sections in the Family Law Article under which litigants in domestic disputes can recover attorney' s fees. They include section 11-110 (alimony), section 8-214 (monetary award), and section 7-

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18 Section 12-103 reads:

(a) In general. - The court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person;

(1) applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties; or

(2) files any form of proceeding:

(i) to recover arrearages of child support;

(ii) to enforce a decree of child support; or

(iii) to enforce a decree of custody or visitation.

(b) Required Considerations.- Before a court may award costs and counsel fees under this section, the court shall consider:

(1) the financial status of each party;

(2) the needs of each party; and

(3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.

(c) Absence of substantial justification. - Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees.

Md. Code (1984, 1999 Repl. Vol.)

107 (divorce). In all these situations, the trial court must consider the same factors before waking an award of attorney's fees. *Collins v. Collins,* 144 Md. App. 395,447 (2002).

Namely, the trial court must consider the financial needs and resources of each party and whether there was substantial justification for prosecuting or defending the proceeding. See *Lemley v. Lemley,* 109 Md. App. 620 (1996)(discussing sections 11-110 and 12-103 of the Family Law Article and noting that the inquiry is the same for both of those sections). In addition, when the court awards attorney's fees "they must be reasonable, taking into account such factors as labor, skill, time, and benefit afforded to the client, as well as the financial resources and needs of each party." *Petrini v. Petrini,* 336 Md. 453, 467 (1994) (citing *Brown v. Brown,* 204 Md. 197, 213 (1954)). The standard of review for the award of counsel fees and costs in a domestic case is whether the trial judge abused his or her discretion in making or denying the award. *Steinhoff v. Sommerfelt,* 144 Md. App. 463, 487 (2002).

Appellant argues that the trial court erred in awarding appellee $10,000 in legal fees for the expenses she incurred during the litigation in the circuit court. He argues that the award was inconsistent with the previously entered consent order that provided that each party shall pay their own attorney's fees incurred on or prior to October 12, 2000. In addition, he argues that the court should have considered the prior awards of attorney's fees against him in order to avoid allowing appellee to "double-dip" and recover the same fees twice. Finally, appellant argues that the court failed to consider the-factors of section 12-103 of the Family Law Article when making its award.

As in *Steinhoff*, there is no question that the judge who awarded the attorney's fees "possessed a thorough knowledge of the case and of the parties, their relative financial positions, the justification for bringing and defending each action, and the work product of the attorneys." *Id.* at 489. Based on the information in the file, there is enough in the record for the court to have considered the financial resources and needs of both parties and whether there was substantial justification for bringing, maintaining, or defending the proceeding, as stated in section 12-103 of the Family Law Article. The court heard testimony regarding the financial positions of both parties and their reasons for litigating this case. In addition, the court observed five days of trial testimony and had appellee's counsel's bills in evidence.

That being said, however, the bills submitted included bills from 1999 through April 2, 2002. When asked by the court what appellee had spent "defending this and filing the counter-claim for modification," counsel for appellee answered that appellee had spent "over $60,000." Later, counsel clarified that the large amount of attorney's fees had accrued over the life of the whole case. As previously noted, the parties agreed to pay their own fees through October 12, 2000, and the court had already ordered appellant to pay $2,100 in attorneys fees on December 19, 2001, and $240 in attorneys fees on March 25, 2002. The court's decision gives no reason for its choice of $10,000 as an appropriate amount. We do not know if the court considered the previous agreement of the parties or the previous attorney's fee awards before choosing $10,000 as the amount to be paid. Such an award is arbitrary and an abuse of discretion. *See Petrini v. Petrini*, 336 Md. 456, 468 (1994) (noting that an award of attorney's fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong). In light of those facts, we must remand for further proceedings on the issue of attorney's fees.

## CONCLUSION

For the reasons stated above, we hold that the circuit court erred by modifying legal custody and visitation without articulating its reasons for doing so and that the court erred by awarding appellee attorney's fees without considering the previous agreement of the parties and previous awards of attorney's fees granted to appellee.

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.**

**COSTS TO BE PAID BY APPELLEE.**

**MANDATE**
**Court of Special Appeals**

Maryland Relay Service
1-800-735-2258
TT/VOICE

No. 00827, September Term, 2002

Rod Schwartz
vs.
Freeda Isaac

**JUDGMENT:** June 26, 2003: Judgment of the Circuit Court for Prince George's County vacated. Case remanded for further proceedings consistent with this opinion. Costs to be paid by appellee. Unreported opinion by Greene, J.

June 30, 2003: Motion for Reconsideration filed by counsel for the appellee.

July 30, 2003: Motion for Reconsideration denied.

July 30, 2003: Mandate issued.

From the Circuit Court: for **PRINCE GEORGE'S COUNTY**
00CAD0007199

**STATEMENT OF COSTS:**

**Appellant(s):**

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|---|---|
| Lower Court Costs- | 60.00 |
| Steno Costs of Appellant- | 2,895.00 |

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|---|---|
| Filing Fee of Appellant- | 50.00 |
| Brief of Appellant- | 151.20 |
| Record Extract- | 2,998.80 |
| Reply of Appellant- | 64.80 |
| **Appellee(s):** | |
| Brief of Appellee- | 723.60 |

*STATE OF MARYLAND, Sct:*

*I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this* **thirtieth** *day of* **July 2003**

/s/ Leslie D. Gradet
Clerk of the Court of Special Appeals

**COSTS SHOWN ON THIS MANDATE ARE TO BE SETTLED BETWEEN COUNSEL AND NOT THROUGH THIS OFFICE.**